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NO. 44

IN THE

Supreme Court of the United States

October Term, 1941

THE UNITED STATES OF AMERICA,
Petitioner

v.

THE STATE OF TEXAS, ET AL

On Writ of Error to The Court of Civil Appeals for The Second Judicial District of Texas

BRIEF FOR THE STATE OF TEXAS

FIRM FOUNDATION—AUSTIN

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BRIEF FOR THE STATE OF TEXAS

PRELIMINARY STATEMENT

Petitioner's statement of the case is adopted, except as supplemented by the statement appearing in connection with either of the two following Counter-Propositions of the State.

At this juncture, however, and to properly determine the limits and scope of this brief, we wish to point to the following ambiguity in the record:

On page 5 of Petitioner's brief under the heading "Specification of Errors to be Urged," we quote the following:

> "The court below erred:
>
> "1. In granting priority in payment of the claim of the State of Texas over the claim of the United States.
>
> "2. *In holding that the lien of the State of Texas, if any, was superior to the lien or prior rights of the United States.* (Italics ours)
>
> "3. *In reversing the decision and judgment of the District Court of Gregg County, Texas, granting priority in payment of the claim of the United States over the claim of the State of Texas.*" (Italics ours)

From the foregoing it would appear that the Federal Government, would, on this appeal, urge the preferential status of its claim under *both* Sections 3466, R. S. (31 USCA 191), the priority statute, and Section 3186 R. S. (26 USCA 1560-62), the lien statute, as was done in the trial court.

On the other hand, on page 2 of Petitioner's brief, we quote the "Question Presented" as follows:

> "Whether, under Section 3466 of the Revised Statutes, the claim of the United States against an insolvent person for gasoline taxes is entitled to priority in payment over the claim of the State of Texas for state gasoline taxes."

And on page 8 of said brief we find the following:

> "This case arises under Section 3466, rather than under Section 3186. Accordingly, the rights of the United States depend, not upon any lien, but simply upon whatever priority is afforded by Section 3466."

We have concluded from the latter two definite statements that the Government does not intend to rely, for purposes of this appeal, on Section 3186, R. S. (26 USCA 1560-62), to afford it a prior lien to secure the taxes involved, but merely and solely relies upon Section 3466 R. S. (31 USCA 191) to give it a priority, independent of any lien. Therefore, despite the contrary intent which seems to appear from the "Specification of Errors to be Urged," the State will limit its answering brief herein to the single question of whether or not Section 3466 R. S. operates to give the United States a right of prior payment from the proceeds of the receivership estate over the asserted prior lien of the State therein and thereto. We will accordingly not brief the question of priority between the lien asserted by the State under Section 7, Article 7065a, Vernon's Texas Civil Statutes, and the lien given to the United States to secure its internal revenue taxes under Section 3186, R. S.

FIRST COUNTER-PROPOSITION TO THE PROPOSITION OR QUESTION PRESENTED BY PETITIONER

The bill or petition upon which a receivership was sought and obtained in the instant case and subsequent interventions, merely making a case of a suit for debt on a promissory note, for foreclosure of a chattel mortgage lien upon specific property, and for a limited receivership in aid and assistance thereof, and ancillary thereto, and not a general equity, insolvency or liquidating receivership over all of the debtor's property, does not constitute either (1) "a voluntary assignment" by the debtor, or (2) a case "in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law," or (3) a "case in which an act of bankruptcy is committed," so as to bring the instant case within the three classes or conditions of insolvency, set out in and required by Section 3466, R. S. (Title 31 USCA Section 191), and consequently such priority Act may not be invoked by the United States of America to give it a priority over the State.

SECOND COUNTER-PROPOSITION TO THE QUESTION OR PROPOSITION PRESENTED BY PETITIONER

(Submitted Alternatively to First Counter-Proposition)

The motor fuel taxes claimed by the State of Tex-

as, were, before the accrual of the right to priority of payment, if any, claimed by petitioner under Section 3466, R. S. (Title 31 USCA Section 191), secured by a true, perfected and specific lien under Section 7, Article 7065a, Vernon's Texas Civil Statutes, upon the property involved in this receivership estate, rather than an inchoate, imperfect and general lien, and consequently such fixed lien cannot be impaired, affected or subordinated by petitioner's asserted right of priority under Section 3466, R. S. (31 USCA 191).

STATEMENT, AUTHORITIES AND ARGUMENT UNDER FIRST COUNTER-PROPOSITION

Statement from the Record

Plaintiff in the trial court sued upon a chattel mortgage note in the sum of $1,103.49, and sought foreclosure of a chattel mortgage lien securing same upon a small portion only of the receivership estate, to-wit:

> Six 250-barrel rundown tanks
> One 1000-barrel storage tank (R. pp. 1-3)

The usual allegations showing statutory grounds under Article 2293, Subdivision 2, Vernon's Texas Civil Statutes, for the appointment of a receiver upon lien foreclosure were made, such as that the mortgaged property was in danger of being materially in-

jured and that the conditions of the mortgage had not been performed and the value of the property was insufficient to discharge the mortgage debt; and that an emergency existed for the appointment of a receiver to preserve such properties (R. pp. 1-3). The receivership appears to be a limited statutory receivership under Art. 2293, Subd. 2, Vernon's Texas Civil Statutes, in contradistinction to a general equity receivership. The pertinent portions of such Article read as follows:

> "Receivers may be appointed by any judge of a court of competent jurisdiction of this state, in the following cases:
>
> ". . .
>
> "2. In an action by a mortgage for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured; or that the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt."

The prayer of plaintiff was for judgment for foreclosure of chattel mortgage lien and for order of sale and writ of possession, (R. pp. 3-4)

Defendant did not file any answer joining in the allegations of plaintiff and praying for the appointment of a receiver. (R.-Index)

R. P. Ash intervened on two chattel mortgage

notes and for foreclosure of the chattel mortgages securing same upon the refining properties in receivership, except the property subject to plaintiff's chattel mortgage (R. pp. 5-9)

Howard Dailey subsequently intervened as sole plaintiff, under allegations that he had acquired all the rights in the subject matter theretofore held by the original plaintiff, M. R. Ingram, and the intervenor, R. P. Ash, with prayer that his claim and liens be decreed as prior and superior to all other parties, against the proceeds in the registry of court, from the sale of such refining properties. (R. 15-21)

The State of Texas and the United States of America filed their respective tax claims and liens, by intervention. (R. 9 and 12).

The point of law presented by this Counter-Proposition involves only the petition or bill upon which the receivership was granted and subsequent interventions; because we take the position that even though an actual insolvency did exist, nevertheless, the Government would not be entitled to the preferential payment claimed from the assets of the estate because the petition or bill and the nature of the case generally, was insufficient, as a matter of law, to give rise to the right of priority claimed by the Government under Section 3466, Revised Statutes (Sec. 191, Title 31, USCA).

Therefore, we respectfully refer the Court to the

entire petition or bill and subsequent interventions in connection with this Counter-Proposition.

Authorities

A. In order for priority Act (Section 3466, R. S., 31 U.S.C.A. 191) to be available to petitioner, mere insolvency not enough but such insolvency must be manifested either by voluntary assignment by debtor, the attachment of the estate of an absconding, concealed or absent debtor, or an act of bankruptcy by such debtor.

United States v. Oklahoma, 261 U. S. 253, 262, 43 S. Ct. 295, 67 L. Ed. 638, 643, 644;
Beaston v. Farmers Bank, 12 Pet. 102, 9 L. Ed. 1017, 1029;
Conard v. Atlantic Ins. Co., 1 Pet. 386, 439, 7 L. Ed. 189, 212;
Bramwell v. United States F. & G. Co., 269 U. S. 483, 46 S. Ct. 176, 70 L. Ed. 368.

1. Appointment of receiver not "voluntary assignment" unless defendant debtor admits the allegations of plaintiff and joins in prayer for receivership, i. e. consent decree is had.

Price v. United States, 269 U. S. 492, 502, 46 S. Ct. 180, 70 L. Ed. 373, 378;
New York v. Maclay, 288 U. S. 290, 53 S. Ct. 323, 77 L. Ed. 754;
United States v. Butterworth-Judson Corp., 269 U. S. 504, 46 S. Ct. 179, 70 L. Ed. 380;

Bramwell v. United States F. & G. Co., 269 U. S. 483, 492, 46 S. Ct. 176, 70 L. Ed. 368;
People of New York v. United States, 106 F. (2d) 210.

2. To constitute "act of bankruptcy" receivership must be general equity receivership rather than limited or special receivership in suit for debt and lien foreclosure.

Beaston v. Farmers Bank of Delaware, 12 Pet. 102, 136, 9 L. Ed. 1017, 1030;
In Re 2168 Broadway Corporation, 78 Fed. (2d) 678, affirmed sub nomine Duparquet v. Evans, 297 U. S. 216, 56 S. Ct. 412, 80 L. Ed. 591;
Central Fibre Product Co. v. Hardin, 82 F. (2d) 692, certiorari denied, 299 U. S. 547, 57 S. Ct. 10, 81 L. Ed. 402;
Standard Accident Ins. Co. v. E. T. Sheftall & Co., 53 Fed. (2d) 40, 41;
Elfast v. Lamb, et al, 111 Fed. (2d) 434.

Argument

We do not believe that it will be controverted by counsel for the Government that the right of priority asserted by them in this receivership is not in virtue of any sovereign prerogative inherent in the United States as against the rights of the State in the collection of debts but rather the asserted right of priority rests exclusively on the statutory provision involved, being *Section* 191, *Title* 31, *USCA* (*R.S.* 3466). This

is too well settled to require the citation of authorities.

In this connection, we might point out that in addition to the absence of a sovereign prerogative, it has not been and is not now the policy of Congress to enact measures which uniformly and consistently accord the United States a priority of payment over taxes owing to states and political subdivisions. As an illustration, we point out that the statute under consideration in this case, fixing priority of claims due the Government, has been superseded, in bankruptcy cases, by Section 64 of the National Bankruptcy Act; *Claude D. Reese Inc.* v. *United States ex rel Collector of Internal Revenue*, 75 Fed. (2d) 9. And by Subdivision 4 of Section 64a of the National Bankruptcy Act, the various governmental units have been placed in a single class upon terms of equality with one another, and the United States is given no priority over states, counties, districts and municipalities in respect of tax claim. *In Re A. E. Fountain Inc.*, 295 Fed. 873, *In Re Wyley Co.*, 292 Fed. 900, *In Re A. J. Waterman Manufacturing Co.*, 291 Fed. 589, *State of Mo.* v. *John T. Ross, Trustee*, 299 U. S. 72, 57 S. Ct. 60.

While the case at bar involves a receivership rather than bankruptcy, we make this point only to show that the Government's claim to priority must find support squarely within the express terms of the statute relied upon, and if that Act fails to avail, there can be no resort to sovereignty or even Congressional policy to support such priority.

For the convenience of the Court, the Act of Congress under consideration is reproduced as follows:

> "*Priority established.* Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrator, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; *and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.* (R. S. Section 3466)" (Italics ours).

Adverting now to the nature and attributes of the Act under consideration, we think the following established rules may be fairly deduced from the adjudicated cases:

First, no lien is created; second, the priority established can never attach while the debtor continues the owner and in possession of the property, though he may be unable to pay all his debts; third, no evidence can be received of the insolvency of the debtor until he has been divested of his property in one of the modes stated; and fourth, whenever the debtor is thus divested of his property, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay the debt first out of the proceeds of the debtor's property. *Beaston* v.

Farmers Bank, United States v. *Oklahoma, Conard* v. *Atlantic Ins. Co., Bramwell* v. *United States F. & G. Co.*, all supra, "Authorities", A.

The nature of the insolvency contemplated by the Act under consideration has been before the United States Supreme Court and inferior Federal courts for construction. The meaning of the word "insolvent" used in the Act and of the insolvency therein referred to, is limited by the language to cases where "a debtor not having sufficient property to pay all his debts makes a voluntary assignment, etc." Common law insolvency or mere inability of a debtor to pay all his debts as they mature in the ordinary course of business is not insolvency within the meaning of the Act. The insolvency contemplated is insolvency in the bankruptcy sense or insufficiency of assets to meet liabilities, *but it must be manifested in one of the modes pointed out in the latter part of the statute which defines or explains the meaning of insolvency referred to in the earlier part. United States* v. *Oklahoma, Beaston* v. *Farmers Bank, Conard* v. *Atlantic Ins. Co. and Bramwell* v. *United States F. & G. Co.*, all supra, "Authorities", A. We cannot stress this point too much.

We submit that even though insolvency in the bankruptcy sense has been found to exist in this case, still the conditions of the statute have not been met and the Government is not entitled to the benefits thereof. The satute does not extend priority where a debtor is insolvent under any and all circumstances but only where such insolvency is manifested by three classes

of cases; first, those in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment of his assets; second, those in which the estate and effects of an absconding, concealed or absent debtor are attached by a process of law; and third, those in which an act of bankruptcy is committed. In other words, these three cases or conditions appearing in the latter part of the priority act are not merely illustrations of the general insolvency spoken of, but are different limitations or manifestations of the situation under which the priority arises. *Beaston* v. *Farmers Bank, United States* v. *Oklahoma, Conard* v. *Atlantic Ins. Co., Bramwell* v. *United States F & G. Co.*, all supra, "Authorities", A.

Clearly the case at bar is not a case where the "estate and effects of an absconding, concealed or absent debtor are attached by process of law." It must fall within the two remaining situations to meet the requirements of the priority act.

It has been held that where a consent decree is entered in a general equity receivership of and for all the property of a debtor, or where the defendant admits the allegations and joins in the prayer for such a receivership, the proceeding is tantamount to a "voluntary assignment" within the meaning of the priority Act. *Price* v. *United States, People of the State of New York* v. *Mark Maclay, United States* v. *Butterworth-Judson Corp., Bramwell* v. *U. S. F. & G. Co., People of New York* v. *United States*, all supra, "Authorities" A (1). But in the case at bar no consent

decree definitely appears to have been entered and a second phase of the priority statute is eliminated. Even a consent decree in a case of debt and lien foreclosure, with limited receivership ancillary thereto, would not constitute a "voluntary assignment" within the meaning of such Act. (Cases infra).

It but remains to be determined if the particular receivership proceeding involved here is tantamount to an "act of bankrupcty"— the third and last phase of the priority Act to be considered. For this purpose reference is had to the National Bankruptcy Act, *11 USCA, Section 21*, as amended in 1926. The only conceivable act of bankruptcy which might be deemed applicable to the facts of the present case is subdivision (5) which provides that an act of bankruptcy by a person consists of his having "made a general assignment for the benefit of his creditors or while insolvent a receiver or trustee has been appointed or put in charge of his property."

To determine when such act of bankruptcy has been committed and the nature of the insolvency involved, we must refer to *Section 1, Subdivision 15, Title 11, USCA*, as it existed on the date of the receivership.

> "A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

We are not unaware of the many decisions holding that the appointment of receivers in certain cases and under certain conditions of insolvency, of and for the property of a defendant owing debts to the United States, is such an act of bankruptcy, under the above pertinent provisions of the Bankruptcy Act and the priority statute, as to give United States a preference. These are the decisions relied upon by th Government, but we suggest that such decisions can be easily distinguished from the case at bar when due consideration is given to the nature of the receivership involved in those cases and the receivership involved in the case before the court.

An examination of the petition or bill, the prayer for relief, the order of the court appointing the receiver in this case and the various interventions, in the light of the above quoted sections of the National Bankruptcy Act defining insolvency and acts of bankruptcy, impels to the conclusion that the receivership had in this case did not amount to an "act of bankruptcy" within the purview of these several Acts of Congress. We submit that the receivership had in the instant case is nothing more than a limited receivership, ancillary to and in assistance of a mere case of debt and foreclosure of lien and is not the general insolvency or equity receivership involving a liquidation of a debtor's assets for distribution among all ceditors. A close examination of the receiverships involved in those cases where the Government has been accorded a priority on the theory that same were "acts of bankruptcy" within the meaning of the priority statute, will reveal that such receiverships

belong to the latter class and did not involve a receivership merely in aid and assistance of debt and foreclosure of lien.

In *Standard Accident Insurance Company* v. *E. T. Sheftall & Co.*, supra, the Circuit Court of Appeals at New Orleans drew the distinction between the two kinds of receiverships, as related to an act of bankruptcy, in the following language:

> "In view of the general purpose of the Bankruptcy Act, we understand a general receivership to be referred to, and not one for specially described property, as in a mortgage foreclosure or an effort to enforce some other lien against specific property. The complainant in the bill under discussion did not seek to sequester in equity described property only but sought for and obtained a general receivership for all the property of the construction company wherever situated, thus withdrawing it from the claims of all common creditors except by intervention in the receivership. We have no doubt that this is such a receivership as was contemplated by the above quoted words of the statute. * * * "

We think it established beyond question that under the pertinent sections of the Bankruptcy Act, an act of bankruptcy is not committed, so as to make Section 3466, R.S. available, unless the receivership is a general insolvency or equity receivership as contradistinguished from the special or limited statutory receivership in this case. *Beaston* v. *Farmers Bank of Delaware*, *Standard Accident Ins. Co.* v. *E.*

T. Sheftall & Co., Elfast v. *Lamb, et al., Central Fibre Products Co., et al* v. *Hardin, in re Broadway Corp., affirmed, sub-nomine Duparquet* v. *Evans* all supra, "Authorities," A(2)

This court held outright in *Beason* v. *Farmers Bank*, supra, that the filing of a bill and the appointment of a receiver, the purpose of the suit being merely to collect a debt, do not amount to such a transfer of the property of the debtor as is contemplated by the then existing priority statute. Such statute contained the same three cases or limitations on the insolvency contemplated thereby as the present statute. And the instant case is solely to collect a debt and enforce a lien on specific property within the principle announced in this case.

RESTATEMENT OF SECOND COUNTER-PROPOSITION TO PROPOSITION OR QUESTION PRESENTED BY PETITIONER

(Submitted alternatively to First Counter-Proposition)

The motor fuel taxes claimed by the State of Texas, were, before the accrual of the right to priority of payment, if any, claimed by petitioner under Section 3466, R. S. (Title 31, U. S. C. A., Section 191), secured by a true, perfected and specific lien under Section 7, Article 7065a, Vernon's Texas Civil Statutes, upon the property involved in this receivership estate, rather than an inchoate, imperfect, and gen-

eral lien, and consequently such fixed lien cannot be impaired, affected or subordinated by petitioner's asserted right of priority under Section 3466, R. S. (31 U.S.C.A. 191).

STATEMENT, AUTHORITIES AND ARGUMENT UNDER SECOND COUNTER-PROPOSITION

Statement from the Record:

The receiver in this cause was appointed November 20, 1933, (R. 4) but it does not appear what time during the day such order was made, nor does it appear when the receiver qualified thereunder. The court fixed the date of November 25, 1933, for hearing on a contest of such appointment (R. 5).

The State intervened for motor fuel taxes, accruing for the months of October and November, 1933, as found by the trial court (R. 37).

Authorities

A. Nature of State's Lien.

1. Taxes not lien on property unless expressly made so.
   40 Tex. Jur. 202 (Taxation Sec. 145)
   State v. Hunt, 207 S. W. 636 (Judgment reversed on other grounds, Hunt v. State, 110 Tex. 204, 217 S. W. 1034)

2. Inherent power of State Legislature to impose occupation and other excise taxes and secure same by lien on the property, real or personal, used in or devoted to the business taxed.

   Article 8, Section 17, Constitution of Texas

   40 Tex. Jur. 205 (Taxation Sec. 146)

   Hodge v. Muscatine County, 196 U. S. 276, 49 L. Ed. 477

   State v. Jones, et al, 290 S. W. 244 reversed on other grounds (Com. App.) 5 S. W. (2d) 973

   In Re Brannon, 62 Fed. (2d) 959

   In Re Robertson, 20 Fed. Sup. 270

   Kirk v. City of Gorman, 283 S. W. 188 (Tex, Civ. App.)

3. Lien of State specific and perfected lien at time motor fuel taxes accrue and become payable and not inchoate or general lien to be ripened into true and perfected lien by levy, distraint, attachment or any other proceedings in or out of court.

   Section 7, Article 7065a, Vernon's Texas Civil Statutes

   28 Tex. Jur. 6 (Liens Sec. 2)

   In Re White Star Refining Co., 74 Fed. (2d) 269 (involves the instant lien statute) Cert. denied 294 U. S. 727, 79 L. Ed. 1257.

   Zorn v. Deberry, 4 Fed. Supp. 905 (involves instant lien statute)

   State of Texas v. Donoghue, 88 Fed. (2d) 48, 50, 51, rev. other grounds, 302 U. S. 284, 82 L. Ed. 264, (involves in part, instant lien statutes.)

Ernst v. Guarantee Millwork, Inc., et al, 93 P. (2d) 404, 408, 409, (comparable labor lien recognized over social security and income taxes.)
Regan v. Metropolitan Haulage Co., 127 N. J. Eq. 487, 14 A. (2d) 257 (comparable garage-keeper's lien.)
In Re Brannon, 62 Fed. (2d) 959
In Re Cardwell, 52 Fed. (2d) 158
Wright, et al v. State, 71 S. W. (2d) 352, (Tex. Civ. App.)
Johnston & Burnham, Inc., et al v. State, et al, 95 S. W. (2d) 144, (Tex. Civ. App.)
Ex Parte Klugsberg, 126 Tex. 225, 87 S. W. (2d) 465.

4. Article 7266, 7272, and 7275 of Chapter 8, Title 122, Vernon's Texas Civil Statutes, cited by petitioner as providing necessary procedure for converting inchoate motor fuel tax lien into a perfected lien against specific property, apply only to ad valorem taxes directly and annually assessed against property, or appearing upon the county tax rolls, rather than the excise taxes involved here, for which no assessment is required, and to secure which a specific constistutional and valid lien is given by Article 7065a, Section 7, Vernon's Texas Civil Statutes, independent of the liens securing ad valorem taxes, and the provisions for their enforcement.
State v. Wynne, 134 Tex. 455, 133 S. W. (2d) 951 (at pp. 957 & 961)

(a) Comptroller of Public Accounts

rather than county tax assessor-collector charged with collection of motor fuel tax.

Sections 2 (2d), 3, 4, 5, 6, 7, 8 of Article 7065a, Vernon's Texas Civil Statutes.

(b) The fixing of a lien to secure excise tax, on property either real or personal, devoted to or used in the occupation or business taxed, does not make such tax an ad valorem tax on such property.

20 R. C. L. 392 (Taxation Sec. 350)

State v. Jones, et al, 290 S. W. 244 (Tex. Civ. App.)

Hodge v. Muscatine County, 196 U. S. 276, 49 L. Ed. 477

Ex Parte Klugsberg, 126 Tex. 225, 87 S. W. (2d) 465

Wright, et al v. State, 71 S. W. (2d) 352, (Tex. Civ. App.)

Johnson & Burham, Inc., et al v. State, et al, 95 S. W. (2d) 144, (Tex. Civ. App.)

State, ex rel. Schwartz v. Ferris, 153 Ohio St. 1, 50 L. R. A. 219, 221.

Blackrock Copper Mining and Milling Company v. Tingey, 34 Utah 369, 98 Pac. 180, 28 L.R.A. (N.S.) 255.

(c) Definition and Nature of Assessment.

40 Tex. Jur. 129 (Taxation Sec. 91)

George v. Dean, 47 Tex. 73

State v. Farmer, 94 Tex. 232, 59 S. W. 541

Republic Insurance Company v. Highland Park Independent School Dis-

trict of Dallas County, 57 S. W. (2d) 627, (Tex. Civ. App.).

(d) Assessment not necessary for excise taxes.

Texas Banking & Insurance Company v. State, 42 Tex. 636.

State v. Bradley, 207 Ala. 677, 93 So. 595, 26 A. L. R. 421.

State v. Pioneer Oil & Refining Company, (Com. App.) 292 S. W. 869.

Libby, McNeill & Libby v. Stratton, 359 Ill. 398, 194 N. E. 572.

State ex rel. Mitchell v. National Life Insurance Company of the United States, 275 N. W. 26.

5. Time of accrual of motor fuel taxes and supporting lien.

61 C. J. 922 (Taxation, Sec. 1172) and cases cited.

In Re White Star Refining Co. 74 Fed. (2d) 269.

State v. Pioneer Oil & Refining Company, 292 S. W. 869, (Com. App.)

B. State's specific lien not divested or affected by mere priority afforded Government under Section 3466, R. S. (31 U. S. C.A. 191).

Thelusson v. Smith, 2 Wheat. 396, 425, 426, 4 L. Ed. 271, 278, 279.

United States v. Knott, 298 U. S. 544, 550, 551, 56 S. Ct. 902, 905, 80 L. Ed. 1321, 1326, 1327.

Beaston v. Farmers' Bank, 12 Pet. 102, 135, 136, 9 L. Ed. 1017, 1030.

Conard v. The Atlantic Ins. Co. of New York, 1 Pet. 386, 7 L. Ed. 189, 213.

Brent v. The Bank of Washington, 9 U. S. 594, 611, 612, 9 L. Ed. 547, 553, 554.
United States v. Nicholls, 4 Yeates 251.
Spokane County v. United States, 279 U. S. 80, 95, 73 L. Ed. 621, 625, 626, 49 S. Ct. 321.
New York v. Maclay, 288 U. S. 290, 77 L. Ed. 754, 53 S. Ct. 323.
Gerson, Beesley and Hampton v. Shubert Theatres Corp., 7 Fed. Supp. 399.
People of New York v. United States, 106 Fed. (2d) 210.
Ernst v. Guarantee Millwork, Inc., 93 P. (2d) 404, 408.
Regan v. Metropolitan Haulage Co., 127 N. J. Eq. 487, 14 A. (2d) 257.

Argument

Even though our first counter-proposition is found not to present a valid proposition of law, in that the type of receivership involved is sufficient to bring the instant case within the purview and meaning of the priority Act, (R. S. 3466) nevertheless, we earnestly contend that such right of priority is defeated and such Act of Congress is not effective to accord a priority, *because at the time of the appointment of the receiver in this case and the consequent priority contended for by the Government, the State of Texas had a true, specific and perfected statutory lien upon the refining properties of the debtor, and such lien could not, under the authorities cited, be divested, subordinated or destroyed by said priority statute.*

As adverted to hereinabove, we think it unquestioned law, admitted by petitioner, that Section 3466, R. S. (31, U. S. C. A. 191), does not provide or afford a lien of any kind. Moreover, we have found no respectable authority holding that a true and specific lien, existing at the time the insolvency contemplated by this Act occurred, would be destroyed or impaired; on the contrary, from the earliest decisions of this Court to the latest, it has been held that such Act will not overreach or supersede a transfer of property or divest a specific lien attached thereto prior to the occurrence of the conditions calling for the operation of this Act. See Authorities, B, supra.

Even the very decisions cited by the Government as being controlling upon the right of the United States to a preference in the payment of its taxes over taxes of a State or political subdivision, make it plain that such decisions do not turn upon a lien question, but merely upon a question of priority between debts or taxes owing to the respective sovereignties, which debts or taxes are not secured by *specific* and *perfected* liens.

To illustrate, in the case of *Spokane County* v. *United States*, supra, this Court limits and confines its decision to a consideration of the priority statute, independent of any question of lien enforcement, in the following language:

> "Assessments for Spokane County for $6,195.38, and of Whitman County for $410.36, were made in 1921 and 1922 before the receiver

was appointed. What is the effect of those claims against the fund in court? In Wilberg v. Yakima County, 132 Wash. 219, 231 p. 931, 41 A. L. R. 184, it is held that the amount of the tax is the personal obligation of the person who owned the property at the time of the assessment and that the tax is to be collected, if the property still continues in the hands of the person against whom it was assessed, from the property; if that specific property does not exist in such hands, the amount of the tax may be collected as a lien upon all the real and personal property of the person assessed and may be collected from the other personal or real property of such person by seizure, distraint, or other specific proceedings. It would seem to follow that a lien for these particular taxes could not interfere with the priority of the United States, *for there is nothing in this record to show that distraint by the sheriff or any of the necessary procedure mentioned in the statute followed.*

" * * *

"(4) *From the judgment in the majority of the Supreme Court of Washington in this case, we must infer that the liens of the two counties for the taxes levied before the receiver was appointed and not collected were not specific. This is really a state question.* It is explained by the concurring opinion of Judge Parker, as follows:

" 'I concur in the result reached in the foregoing majority opinion solely upon the ground that this tax debt due to the United States, viewed apart from any supporting lien right, has priority over this tax debt due the State of Washington, viewed apart from any supporting lien right. It seems clear to me that each of these two tax

debts primarily came into existence by the levy of a tax in personam, and not by the levy of a tax in rem. I think a critical reading of the revenue legislation of the respective sovereignties, the United States and the state, and the record in this case showing the manner of the levying of these respective taxes, will render this plain. *The revenue legislation of each has prescribed procedure by which its personam tax debts may be made specific liens upon property of one personally owing such tax debt.* This record, I think warrants the conclusion that neither the United States, the State of Washington, nor Spokane County for the State of Washington, has ever, by the prescribed statutory procedure, perfected its inchoate tax lien right against any of the property of which the funds here in question are the proceeds. I, therefore, view these respective tax debts wholly apart from any supporting lien right. Thus I think the question of which 'shall be first satisfied' out of these funds is determinable by the language of section 3466, . . . quoted in the majority opinion, and hence must be determinable in favor of the United States.'

"Whatever might have been the effect of more completed procedure in the perfecting of the liens under the law of the state, upon the priority of the United States herein, the attitude of the state court relieves us of consideration of it." (Italics supplied)

In *New York* v. *Maclay*, supra, cited by petition in its brief as controlling here, the Court, although holding that the lien asserted by the State in that case was inchoate and imperfect rather than a specific lien at

the time the rights of the Government to priority accrued and, therefore, would not defeat such priority, emphasized the fact that a different decision might have been necessary had the lien of the state been of a different nature.

In *United States* v. *Knott*, supra, this Court, in discussing the nature of the competing Florida claim, observed: "Such an interest lacks the characteristics of a specific perfected lien which alone bars the priority of the United States."

Under this Counter-Proposition, we concede that petitioner, United States of America, is entitled to prior payment out of the proceeds of this receivership estate, *unless the State had a true, perfect and specific lien upon the properties involved to secure its tax claim at or prior to the date of the instant receivership.* In other words, if the nature of the proceeding is sufficient to invoke the priority statute relied upon by the Government, and the State does not have such a vested and specific lien prior to receivership, then, considered purely on the basis of tax claims unsupported by any liens, the Government is clearly entitled to priority under these decisions. But that is just as far as the decisions go, and this Court has expressly declared that the preference statute does not avail if a specific and perfected lien existed on the property prior to the conditions giving rise to such statute.

It thus appears that the question resolves itself into whether or not the lien, asserted by the State of

Texas in the case at bar, was specific and perfected before a right of priority under *Section 3466*, R. S. accrued, if it does so accrue as contended by the Government.

For the convenience of the Court we copy the pertinent portion of said lien statute, Article 7065a-7, Vernon's Texas Civil Statutes:

> "All taxes, fines, penalties and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated, upon all the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, stocks on hand of every kind and character whatsoever used or usable in such business, including crude oil or other materials for the manufacture, refining, blending or compounding of motor fuels and the refined products therefrom and the proceeds from the sale of such materials and refined products, and any other property of every kind and character whatsoever and wheresoever situated devoted to such use and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business."

An examination of the foregoing lien statute impels to the conclusion that such lien accrued prior to the receivership in this case and any possible right of

priority, and was not a mere inchoate or imperfect lien, such as was involved in the cases next hereinabove discussed. In those cases it was, under the applicable lien statute, necessary for the property to be seized under a warrant of distraint issuing from the tax authorities of the particular state, or for some other procedure to be taken, in or out of court, in order to convert an inchoate lien into a true and perfect one. But under the lien statute of this State, no proceedings by warrant of distraint or otherwise are provided or made necessary to the creation of a perfected and specific lien, but such lien is made to accrue or arise at the time a liability for taxes accrues, and remains a fixed charge on the property from that time on. In other words, the tax levy for which the State of Texas asserts its claim is in *rem* and not the mere levy of a tax in *personam*. The tax is secured at the time of accrual by a fixed charge or lien upon the property described in the Act, and is not a mere personal obligation which could be ripened into a lien by certain statutory procedure.

Ballentines Law Dictionary, according to *Texas Jurisprudence*, supra, defines and distinguishes special liens and general liens as follows:

> "With respect to their nature, liens are classified as general and special. A special lien is one upon a particular property. If a lien extends to everything acquired and to be acquired, it is not special but general."

Unlike the lien statutes of the taxing sovereign-

ties involved in the cases upon which petitioner stands, the above lien statute fixes and confines such lien to specific property, i. e., only the property which is used in the business of manufacturing and distributing motor fuel in Texas, such as refinery, blending plants, storage tanks, etc. The Texas lien does not, as such other tax liens, including the Government's, extend to "all property or rights to property, whether real or personal," etc., belonging to the taxpayer, but only rests upon and is a charge upon the property used in the taxed business. The distributor might have all kinds of property, both real and personal, and if the State's lien had been a broad general lien upon all such property, it would be necessary for some steps to be taken by levy, distraint, etc. to convert such general lien into a specific lien. But for the lien resting upon particularly described and specific property no such procedure is necessary and no such procedure has been provided or required by the Legislature of Texas, contrary to the assertion of petitioner in its brief that we have not followed the procedure required to perfect our lien, under the entirely inapplicable provisions of Articles 7266, 7272, and 7275, Vernon's Texas Civil Statutes.

We think the case of *In Re White Star Refining Company*, supra, "Authorities," A(3), is directly in point upon this question. In discussing this very lien statute, the court said:

> "The taxes here involved are given a lien by these statutory words: 'All taxes, fines, penalties and interest due by any distributor to the State

> shall be a preferred lien . . . upon all of the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles or any other property devoted to such use, and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business.' Article 7065a-7, Vernon's Annotated Civil Statutes. *The lien probably arises as the taxes accrue.* See 61 C. J., Taxation, 1172, 1173, and cases cited. *It does not depend on insolvency or any court action. The tax is a claim secured by the described property.*" (Italics ours).

The cases of *Zorn* v. *Deberry* and *State of Texas* v. *Donoghue*, both supra, "Authorities," A(3) holds inferentially, if not directly, that the motor fuel tax lien of the State of Texas is a specific lien upon certain properties and is not a lien acquired through court action or other necessary steps. These cases turn upon the very lien statute under consideration here and determine that same is a lien such as, under Title 11, U.S.C.A., Section 107 (d), would not be affected by bankruptcy and is not a lien brought within the purview and meaning of Title 11, U.S.C.A., Section 107(f), to the effect that "all levies, judgments, attachments or other liens obtained through legal proceedings * * * shall be invalidated by adjudication of bankruptcy." In the Donoghue case, the motor fuel tax lien foreclosure suit yielded to reorganization proceedings because a receiver was not appointed in State court until after reorganization

proceedings, rather than because the tax lien was not specific and perfected (p. 51 of opinion).

We submit that these cases are in point because the Government asserts that the statutory tax lien of the State is inchoate and must be perfected by levy, seizure and sale under Articles 7266, 7272, and 7275, Vernon's Texas Civil Statutes, and these decisions hold that it is not a lien which is perfected by attachment, levy, etc., but a true lien which is not affected by bankruptcy.

Turning upon the same sections of the Bankruptcy Act, the cases of *In Re Cardwell* and *In Re Brannon*, both supra, "Authorities," A(3), held that under Article 5238, Vernon's Texas Civil Statutes, a landlord has a lien on all property of the tenant on the rented premises, and no record or other action is necessary to perfect it for arrears not exceeding six months, and therefore, was such a statutory lien as was in existence prior to bankruptcy, and, not being dependent upon a levy of any character for its inception, would not be defeated or affected by bankruptcy. We invite a comparison of the landlord statute to the tax statute involved here and say, with stronger reasoning, that if the first is a specific and perfected lien, certainly the latter would be.

In the cases of *Wright, et al* v. *State* and *Johnson & Burham, Inc., et al* v. *State, et al*, both supra, "Authorities" A(3), the courts held that the statutory tax lien involved here was and became a lien upon certain described property, upon a delinquency of mo-

tor fuel taxes, and it was not shown that any steps were taken, by levy, attachment or otherwise to fix such liens, and the court did not feel constrained to hold that such steps were necessary.

In *Ex Parte Klugsberg*, supra, "Authorities," A (3), the statutory lien given to secure cigarette taxes due the State of Texas, identical in tenor and application to this lien, was upheld without any indication that certain steps were provided by statute for perfecting and accruing such lien.

The Government relies heavily upon the failure of the State to comply with the provisions of Articles 7266, 7272, and 7275, of Chapter 8, Title 122, Vernon's Texas Civil Statutes, for the purpose of converting its alleged inchoate motor fuel tax lien into such a perfected lien against specific property, as is necessary, under the decisions, to defeat the asserted priority of the United States. We earnestly submit that the cited Articles have nothing whatsoever to do with this case. Such statutory provisions relate solely to the duties of the Assessor-Collector of Taxes for the various counties of the State, in the collection of ad valorem taxes due and owing to the State and its various political subdivisions and do not expressly, or by necessary implication, relate to the collection of the excise tax levied by Article 7065a, Vernon's Texas Civil Statutes, upon the sale or use of motor fuel in Texas. The latter Act expressly charges the Comptroller of Public Accounts of the State of Texas with the general administration of the Motor Fuel Tax Law and the collection of the taxes levied there-

by. In this connection, Section 2(d) provides, in part, as follows:

> "Every distributor making first sale of motor fuel shall pay to the State of Texas an occupation or excise tax equal to four (4) cents per gallon or fractional part thereof, so sold, distributed or used, and such tax shall be due and payable at the office of the Comptroller at Austin, Texas, on the 20th day of each month, the same to be based on such sales or use made during the calendar month next preceding, and at the same time, such distributor shall make and deliver to the Comptroller a report properly sworn to and executed by such distributor or his representative in charge, on such forms as the Comptroller shall prescribe, which, among other things, shall give the number of gallons of motor fuel sold, distributed or used, intrastate and interstate, and exported during the preceding calendar month, and the number of gallons of motor fuel used, distributed or lost by fire or otherwise upon which no tax is paid."

Sections 3-6 of said Act provide for the licensing and bonding of a distributor of motor fuel by the Comptroller of Public Accounts and the forfeiture by him of the permit issued for failure to comply with the law.

Section 7 of said Act, which affords the State the lien herein asserted, provides, in part, as follows:

> "If any distributor shall fail to remit proper taxes due, the Comptroller may employ audi-

tors or other persons to ascertain the correct amount due, and if such taxes have not been properly remitted, the distributor shall pay the reasonable expenses incurred in such investigation and audit as additional penalty. Provided however, that all funds paid to the auditors of the Comptroller as expenses incurred in making audits, shall be placed in a special fund in the State Treasury, which shall be used until exhausted for making other audits, and said sums are hereby appropriated for that purpose. Provided, that nothing herein shall prevent the Comptroller, when said fund is exhausted, from using other funds available for that purpose."

Section 8 of the Act requires every distributor of motor fuel in Texas to keep for a period of two years certain records for the inspection of the Comptroller and the Attorney General, and gives the Comptroller or his authorized representatives the authority to examine such records for the purpose of determining the tax liability of such distributors.

Subdivisions (d) and (e) of said Section 8 provide as follows:

"(d) If any distributor fails or refuses to pay any tax, penalties or interest within the time and manner provided by this Act, and it becomes necessary to bring suit or to intervene in any manner for the establishment or collection of said claim, in any judicial proceedings, any report filed in the office of the Comptroller by such distributor or his representative, or a certified copy thereof certified to by the Comptroller or Chief Clerk, showing the amount of motor fuel sold by

such distributor or his representative, on which such tax, penalties or interest have not been paid, or any audit made by the Comptroller or his representative from the books of said distributor, when signed and sworn to by such representative as being made from the records of said distributor or person from whom such distributor has bought, received or delivered motor fuel whether from a transportation company or otherwise, such report or audit shall be admissible in evidence in such proceedings, and shall be prima facie evidence of the contents thereof; provided, however, that the incorrectness of said report or audit may be shown.

"(e) In the event the Attorney General shall file suit or claim for taxes and attach or file as an exhibit any report or audit of said distributor, and an affidavit made by the Comptroller or his representative that the taxes shown to be due by said report or audit are past due and unpaid, that all payments and credits have been allowed, then, unless the party resisting the same shall file an answer in the same form and manner as required by Article 3736, Revised Civil Statutes of Texas, of 1925, as amended by Chapter 239, Acts of the Regular Session of the Forty-second Legislature, said auditor or report shall be taken as prima facie evidence thereof, and the proceedings of said Article are hereby made applicable to suits to collect taxes hereunder."

It is apparent from the foregoing pertinent provisions of the Motor Fuel Tax Law that the excise taxes levied thereby do not arise by virtue of any annual *levy* by the Commissioners' Court of the county

or annual *assessment* by the Assessor-Collector of the county, charged under the Constitution and statutes of Texas with the collection of ad valorem and certain other taxes. The Legislature, itself, by the enactment of the Motor Fuel Tax Law, has made a levy of 4c for each gallon of motor fuel sold, used or distributed in the State; and no assessment of this tax is contemplated or required because the tax is established by the return of the taxpayer or distributor on the 20th day of the month succeeding the month during which the motor fuel was sold or used, or, absent such voluntary return, by the duly made and certified audit of the Comptroller of Public Accounts. The amount of such motor fuel tax is computed entirely on the volume of business done, on a gallonage basis, for a given period rather than upon the valuation of the physical properties, real and personal, owned by the taxpayer on the first day of January of the tax year. An *assessment* is not necessary for the accrual of an excise tax or its supporting lien. We refer to the authorities cited under this Counter-Proposition ("Authorities," A-4)

We make this apparently simple point because Articles 7266, 7272, and 7275 of Chapter 8, Title 122, Vernon's Texas Civil Statutes, relied upon so strongly by petitioner as applicable and necessary to the proper fixing of the State's motor fuel tax lien, comprehend merely taxes annually levied and assessed or appearing upon the county tax rolls, and which, being unsecured by any specific constitutional or statutory lien against any particular property, depend upon the statutory seizure and levy by the col-

lector for the creation of a lien. This is apparent from the following provisions of Article 7266:

> "If any person shall fail or refuse to pay the taxes imposed upon him or his property by law, until the first day of January next succeeding the return of the *assessment roll* of the county to the Comptroller, the *tax collector shall, by virtue of his tax roll*, seize and levy upon and sell so much personal property belonging to such person as may be sufficient to pay his taxes, together with all costs accruing thereon; provided, there shall be no levy on property when the owner thereof has the right to pay at the Comptroller's office, until a list of the persons who have paid their taxes at said office has been furnished the tax collector by the Comptroller. The Comptroller shall forward said list of paid taxes on or before the first day of February of each year; and the tax collector shall, immediately on receipt of said list from the Comptroller, levy on and sell the property of such non-residents as have not paid their taxes, in accordance with the law regulating the sale of property for taxes." (Italics ours)

It will be noted that the taxes which the Collector is authorized and required to collect by levy and seizure of personal property are such taxes as appear on the "assessment roll" of the county, and it is under the authority of such "tax roll" that said official proceeds to act. Moreover, the caption of the Act, of which said Article is a part, (Acts 1887, p. 127; General Laws of Texas, Vol. 9, p. 128), recites its purpose to be "to provide for a more thorough and efficient assessment of property and the collection of taxes

thereon." This clearly indicates the legislative intent to embrace within the purview of said Articles direct ad valorem taxes on property rather than excise taxes on the sale or use of commodities, including motor fuel.

The same may be said of Articles 7272 and 7275 of Chapter 8, Title 122, Vernon's Texas Civil Statutes, quoted by petitioner in appendix to its brief, as a mere reading of these statutes impels to the conclusion that the levy, seizure and sale by the tax collector, required and authorized thereby, is for the collection of poll taxes and direct ad valorem taxes on real and personal properties, subject to assessment, but which taxes are unsecured by liens on specific property. As pointed out above, the Legislature of Texas has provided an entirely different statutory set-up for the collection of delinquent motor fuel taxes. The statutory lien given by Section 7 of said Act (Article 7065a, Vernon's Texas Civil Statutes), upon specific property, arises as the tax liability accrues, and no assessment, seizure, levy, etc., is required under such system, either by the language of the pertinent provisions of said Act, or the cases hereinabove discussed.

We respectfully submit that our statutory motor fuel tax lien is radically different from the tax liens involved in the cases upholding the priority of taxes due the United States over those due a state or its taxing subdivisions. In *Spokane County* v. *United States*, supra, the county's lien was described by the court as follows:

"Assessments for Spokane County for $6,195.38, and of Whitman County for $410.36, were made in 1921, and 1922 before the receiver was appointed. What is the effect of those claims against the fund in court? In Wilberg v. Yakima County, 132 Wash. 219, 231 p. 931, 41 A. L. R. 184, it is held that the amount of the tax is the personal obligation of the person who owned the property at the time of the assessment and that the tax is to be collected, if the property still continues in the hands of the person against whom it was assessed, from the property; if that specific property does not exist in such hands, the amount of the tax may be collected as a lien upon all of the real and personal property of the person assessed, and may be collected from the other personal or real property of such person by seizure, distraint, or other specific proceedings. It would seem to follow that a lien for these particular taxes could not interfere with the priority of the United States, for there is nothing in this record to show that distraint by the sheriff or any of the necessary procedure mentioned in the statute followed.

"From the judgment of the majority of the Supreme Court of Washington in this case, we must infer that the liens of the two counties for the taxes levied before the receiver was appointed and not collected were not specific. This is really a state question."

In *New York* v. *Maclay*, supra, the State of New York was asserting a claim for franchise taxes due the years 1921 to 1925, *but not assessed or liquidated until after the receivership* in 1927. The court held

that the liability being unliquidated and unknown, the lien securing same was not perfect and specific.

In *Gerson, Beasley and Hampton, Inc.* v. *Shubert Theatre Corporation*, supra, the tax lien involved was held not to have become specific before receivership, because the statutory procedure was not followed. The court, in passing, held that both the lien of the United States contended for in that case, as well as the lien of the State, was inchoate:

> "That the liens on the corporation's assets given to the United States by section 3186 of the Revised Statutes and to the state by section 219-c of the Tax Law were inchoate or general only, and not perfected or specific, is manifest from mere reading of the statutes themselves. So far as I have discovered, the sole method prescribed by the law of New York for making a lien specific, in a case like that under consideration, is for the sheriff of a county where corporate property is located to levy on it a warrant issued by the State Tax Commission. This is true by force of section 219-e of the Tax Law, which provides that the warrant is a lien upon the property levied on by the sheriff from the time of an actual levy. Here the exclusive method for rendering the state's lien specific was never resorted to. Not alone was there never an actual levy, but not even a warrant directing a levy was ever issued. In consequence, the state did not preceding October 20, 1931, or at any time acquire a specific lien.
>
> "The lien of the state never having become specific and insolvency of the corporation having

occurred, it follows, as I see it, that the United States is entitled to priority for its 1926 taxes over the state of New York for its 1928 taxes. Settle order on two days' notice."

In *Re Lincoln Chair and Novelty Company*, 9 N. E. (2d) 7, the court held that although the franchise taxes claimed by the State had been assessed and liquidated, that nevertheless *no specific property having been seized or appropriated to the satisfaction of the debt or set apart from the general property of the debtor, such statutory tax lien was like the lien of a* judgment which is not specific but merely gives to the creditor the right to payment out of the property *after the property or a part thereof is appropriated and set apart for that purpose.*

For the same reason we think the case of *Thelusson* v. *Smith*, supra, "Authorities," B, relied upon by the Government, is not in point because it involves a general judgment lien of a state.

We could similarly discuss all of the cases which are cited by the Government as defeating the State's lien, but suffice to say that under our tax lien no setting apart or appropriation of specific property from the general mass of property of the taxpayer, by seizure or levy, is necessary, for the statute itself fixes and designates the property under lien. It therefore appears that it does not in any way resemble a judgment lien or other inchoate tax lien such as involved in the cases relied upon by petitioner.

It is plain that this true and specific lien relied up-

on by the State arises at the time the tax accrues and liability for its payment commences. The statute does not fix a different time, and in such case this appears to be the proper accrual date. *61 C. J. 922 (Taxation Section 1172); In Re White Star Refining Company*, supra.

It must next be determined when the liability for motor fuel taxes accrues. We think this question is settled by the case of *State* v. *Pioneer Oil and Refining Company*, supra, holding that such taxes for the month of April, 1923, became due and constituted a liability to the State on May 25, 1923. Under that statute the time fixed for the monthly report and remittances was the 25th of the month for the preceding month. Under the present statute such date is fixed on the 20th of the month.

In concluding this brief, we strenuously dispute the contention of petitioner that "if there were no mortgage creditor in this case, and if the controversy were merely as between the United States and Texas, it is clear that Section 3466 would require priority to be accorded to the claims of the United States," (petitioner's brief, p. 9) and that the decision under review here was prompted by the so-called "dilemma" which the lower courts of this State faced with the presence of said mortgage creditor, as more fully pointed out on pages 6 and 11 of petitioner's brief, to which we respectfully refer the Court. The priority which the Government recognizes in the chattel mortgagee here, and which is supposed to provoke this "dilemma," is expressly given by Section 3186, Re-

vised Statutes (26 U.S.C.A. 1560-62), the lien statute, rather than by Section 3466, Revised Statutes (31 U.S.C.A. 191), the priority statute. This fact and the solution or formula proposed by the Government is clearly set forth at page 91 of the decision in *Spokane Co.* v. *United States*, supra, cited by petitioner in this connection.

On page 8 of petitioner's brief it is stated that "this case arises under Section 3466 rather than under Section 3186." If the issues raised by this review are thus limited (and we have been so governed in preparing this answering brief), then it follows that the "dilemma" and its solution proposed by the Government in the Spokane County case is not applicable to the case at bar. The issue squarely before this Court is whether or not said priority statute, Section 3466, gives the United States a preferential payment of its tax claim, *unsupported by any lien*, over the tax claim of the State of Texas, which we contend is supported by a specific and perfected lien prior to the accrual of such priority. If the Government's tax claim yields to the chattel mortgage creditor, under this Act, (Section 3466), it is by virtue of the decisions cited herein, holding that a mere priority statute will not divest or defeat an existing valid lien, rather than the provisions of the lien statute (Section 3186, Revised Statutes) expressly recognizing the preferential status of such mortgage lien over the Government's lien. On this appeal the Government has abandoned the lien it asserted in the lower courts and hence the "dilemma" arising therefrom, if any ever existed, goes out of the case.

We therefore urge a full decision by this Court upon this issue, placed squarely before it by the record, and suggest that the formula urged upon this Court by petitioner will not fully and satisfactorily adjudicate the ever-recurring conflict between the two taxing sovereignties present here, to the prejudice and confusion of their respective tax-collecting officials. We submit that such formula is specious but not sound or based upon fundamental legal principles; because the setting aside from the funds in court of a sufficient amount to pay the mortgage creditor and then allowing therefrom the State of Texas a prior satisfaction of its lien pro tanto, would place the State in the position of an unsecured creditor with reference to the balance of its debt and lien and would not properly determine the priority of the State's lien statute over the Government's priority statute, a question directly raised by this appeal and the State's brief.

WHEREFORE, the State of Texas prays that the judgment of the Court below be in all things affirmed.

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The attorneys for Petitioner are: Charles Fahy, Acting Solicitor General; Samuel O. Clark, Jr., Assistant Attorney General; Sewall Key, Arnold Raum, J. Louis Monarch, Clarence E. Dawson, Special Assistants to the Attorney General.

A copy of this brief has been delivered to each of said attorneys.

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SUPREME COURT OF THE UNITED STATES.

No. 44.—October Term, 1941.

The United States of America, Petitioner, *vs.* The State of Texas, et al., Respondents.	On Writ of Certiorari to the Court of Civil Appeals, Second Judicial District, State of Texas.

[December 22, 1941.]

Mr. Justice Byrnes delivered the opinion of the Court.

W. L. Nix was a manufacturer and distributor of motor fuel, doing business in Texas under the name of Texas Refinery. On November 20, 1933, M. R. Ingraham, who held a demand note secured by a chattel mortgage on certain tanks belonging to Nix, brought an action in the District Court of Gregg County, Texas. He alleged that demand had been made on the note, that it had not been paid, that Nix owned no property in Texas other than that of Texas Refinery, that the value of the mortgaged tanks was insufficient to discharge the note, that the tanks were not used "for a separate purpose" but in the "operation of the said refinery as a unit," and that Nix was insolvent. He asked that judgment be entered in his favor for the amount of the note, that the mortgage be foreclosed, and that in the meantime a receiver be placed in charge of "the whole of the property" of Texas Refinery. On the same day a receiver was appointed, and he was subsequently authorized to sell all of the refinery property.

On November 21, R. P. Ash intervened in the proceedings as the holder of an overdue note secured by a mortgage on the physical plant of the refinery not subject to the Ingraham mortgage. Both the state of Texas and the United States then intervened with the claims for state and federal gasoline taxes which are the subject of the present dispute. Later both the Ingraham and Ash mortgage notes were assigned to Howard Dailey.

The District Court found that Nix was insolvent on November 20, 1933, and continued to be insolvent thereafter. The sum available

for distribution after sale of the refinery property by the receiver was $7466.92. The court found that of these proceeds $1294.80 was allocable to those assets which were subject to the mortgages held by Dailey, and it ordered that his claim to that amount be first satisfied. It determined that Nix was liable to the United States for $19,343.91 in federal gasoline taxes, and to Texas for $40,312.51 in state gasoline taxes. As between the state and federal claims, it decided that the United States was entitled to priority and concluded that nothing would be left to apply to the Texas claim.

From this order Texas appealed to the Court of Civil Appeals for the Second District. That court certified the controlling questions to the Supreme Court of Texas. The Supreme Court, on the authority of *State* v. *Wynne*, 134 Tex. 455, a companion case decided the same day, answered the questions in such a way as to require that the claim of Texas be first satisfied, that of Dailey second, and that of the United States third. The Court of Civil Appeals thereupon so ruled, noting that the assets available would not completely satisfy even the claim of Texas and that Dailey and the United States would receive nothing. A motion by the United States for a rehearing was denied, and the Supreme Court of Texas refused to review the decision of the Court of Civil Appeals. We granted the petition of the United States for certiorari because of the important question of the fiscal relationship between state and federal governments which is involved.

No question as to the rights of Dailey, the mortgagee, is raised by this appeal. We confine ourselves, therefore, to the only question presently open to decision: the relative priority of the claims of the United States and Texas.

The United States rests its assertion of priority upon § 3466 of the Revised Statutes.[1] Despite the contention of Texas to the contrary, that section clearly applies to this proceeding. As we recently remarked in *United States* v. *Emory*,[2] § 3466 covers in terms the case of an insolvent debtor who has committed

[1] U. S. Rev. Stat. § 3466 (U. S. C., Title 31, Section 191) provides: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

[2] No. 33, Oct. Term 1941.

an act of bankruptcy, and there are few more familiar examples of an act of bankruptcy than the appointment of a receiver because of the debtor's insolvency. *Cf.* § 3(a)(4) of the Bankruptcy Act, U. S. C., Title 11, § 21(a)(4). Here the district court expressly found that Nix was insolvent, and it appointed a receiver. It is true that the original petition was filed by a mortgagee rather than by a general creditor. But if any limitations upon the operation of § 3466 might otherwise have flowed from this circumstance they were removed by the subsequent character of the proceeding. The receiver was placed in control of all of Nix's assets, rather than only those subject to the mortgage, and all of the assets were eventually liquidated. Parties other than the mortgagee, including Texas itself, intervened and were heard. We think that realities require us to treat the proceeding as a general equity receivership within the scope of § 3466.

We are thus brought to the important issue in the case. Article 7065a-7 of the Texas Civil Statutes declared that all gasoline taxes due by any distributor to the state "shall be a preferred lien, first and prior to any and all other existing liens, upon all the property of any distributor, devoted to or used in his business as a distributor . . . ."[3] It is the state's position that under this section it held a specific and perfected lien upon the refinery property which entitled it to priority despite § 3466 of the Revised Statutes.

Section 3466 mentions no exception to its requirement that "the debts due to the United States shall be first satisfied." It is nevertheless true that in several early decisions this Court read an exception into the section in the case of previously executed mortgages. *Thelusson* v. *Smith*, 2 Wheat. 396, 426; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611, 612. This doctrine seems to have been based on the theory that mortgaged property passes to the mortgagee and is no

[3] The full text of the paragraph, as of Nov. 20, 1933, when the receiver was appointed read: "All taxes, fines, penalties and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, upon all the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, or any other property devoted to such use, and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business." This section was repealed on May 1, 1941 by Article XVII, § 28 of the Acts of the 47th Legislature, and simultaneously replaced without significant change by a new Article 7065b-8.

longer a part of the estate of the mortgagor. See *Conard* v. *Atlantic Insurance Co., supra*, at 441-442. The question of whether the priority of the United States under § 3466 would also be defeated by a specific and perfected lien upon property whose title remained in the debtor was reserved in those cases. *Ibid; Brent* v. *Bank of Washington, supra*, at 611-612. However, it was determined that a general judgment lien upon the lands of an insolvent debtor does not take precedence over claims of the United States unless execution of the judgment has proceeded far enough to take the land out of the possession of the debtor. *Thelusson* v. *Smith, supra*, at 425-426.

In more recent years the Court has had occasion to consider the argument that liens created in favor of states or counties by state statutes entitled them to priority over the United States under § 3466. In *Spokane County* v. *United States*, 279 U. S. 80, the priority of the United States was upheld. The state statutes involved provided that if a certain personal property tax was not paid, and if the personal property against which it had been assessed was no longer in the hands of the delinquent taxpayer, the amount of the unpaid tax should become a lien upon all the real and personal property of the taxpayer. They went on to prescribe the procedure by which the lien was to be enforced. The Court determined that the statutory lien did not become specific until this procedure had been followed. Since these procedural conditions had not been satisfied in the case before it, the Court refused priority to the tax claims of the county. It specifically declined to consider what "the effect of more completed procedure in the perfecting of the liens under the law of the State" would have been. 279 U. S. at 95.

The New York statute in *New York* v. *Maclay*, 288 U. S. 290, declared that the corporate franchise tax there involved should "be a lien and binding upon the real and personal property of the corporation . . . until the same is paid in full." 288 U. S. at 292. Although the franchise taxes in question were overdue, the state had taken no steps to perfect and liquidate its lien at the time the receiver was appointed for the insolvent corporation. Under such circumstances, the Court was of the opinion that the tax claim of the state did not deprive the claim of the United States of its priority under § 3466. It was at pains to make clear, however, that it intended by its decision to lend no support to the assumption that the doctrine of the mortgage cases, whatever its current vitality,

would require the subordination of unsecured claims of the United States to a specific and perfected lien. 288 U. S. at 293-294.[4]

We think that it is equally unnecessary to test that assumption here. Prior to the appointment of the receiver on November 20, 1933, the state of Texas had made no move to assert the lien proclaimed in Article 7065a-7. And the priority which attached to the claim of the United States on that day (*United States* v. *Oklahoma*, 261 U. S. 253, 260) could not be divested by any subsequent proceedings in connection with the state's lien. *New York* v. *Maclay*, *supra*, at 293.

It is urged, however, that Article 7065a-7 by its own force creates a specific and perfected lien. Support for this contention is said to lie in the fact that the statutory lien purports to affect only the property of the distributor which is "devoted to or used in his business as a distributor" rather than his property in general. This is thought to make the lien sufficiently specific. Moreover, the State argues, and the Supreme Court of Texas has declared,[5] that the provisions of the Texas Civil Statutes which govern the levy, seizure and sale of the property of delinquent taxpayers generally[6] are inapplicable to the gasoline tax. We are of course bound by this authoritative construction of the statute.

With respect to this contention it may first be said that the "property devoted to or used in his business as a distributor" is neither specific nor constant. But a more important consideration is that the amount of the claim secured by the lien is unliquidated and uncertain. As we said in *New York* v. *Maclay*: "If the state were to . . . omit to ascertain the debt, it would never be able to sell anything, for it would not know how much to sell." 288 U. S. at 293. That the legislature of Texas recognized this is revealed by another section of the statute. Article 7065a-8(d) declared that in the event of default, when it might become necessary for the state "to bring suit or to intervene . . . for the establishment or collection" of its claims in judicial proceedings,

[4] In United States v. Oklahoma, 261 U. S. 253, the question was not reached because it was found that the "insolvency" upon which the operation of § 3466 is conditioned was absent. The Court sustained the priority of the United States under § 3466 in United States v. Knott, 298 U. S. 544. The Florida statutes there involved required foreign surety corporations to deposit certain bonds with the State Treasurer for the protection of Florida residents. This arrangement was held to create no more than "an inchoate general lien" for the benefit of unknown persons who might become entitled to the fund, and not to limit the effect of § 3466.

[5] State v. Wynne, 134 Tex. 455, at 473

[6] See, esp., Articles 7266, 7272, and 7275 of the Texas Civil Statutes.

the tax reports required of the distributor by other provisions of the statute[7] should be "prima facie evidence of the contents thereof," but "the incorrectness of said report or audit may be shown." Thus it was clearly envisaged that the amount of the taxes due, for which the lien was security, should be left to determination by the courts.

As to the nature of the proper procedure for levy, seizure, and sale, it is enough to say that some procedure is essential. As we have indicated, the statutory scheme reveals that the legislature contemplated resort to the courts. In addition to the statutory provisions referred to above, Article 7065a-8(e) regulates the pleadings in suits by the Attorney General to collect the tax, and Article 7065a-9 determines the venue of such suits. Consequently, while it was clearly intended by Article 7065a-7 to create a lien in favor of the state, we must conclude that of necessity it was nothing more than an inchoate and general lien. Certainly it did not of its own force divest the taxpayer of either title or possession. It could not become specific until the exact amount of the taxes due had been determined, and it could not be enforced without the assistance of the courts. Like the tax lien in *New York* v. *Maclay*, *supra*, it served "merely as a *caveat* of a more perfect lien to come." 288 U. S. at 294.

We are not now called upon to decide whether the chattel mortgages held by Dailey are entitled to priority over the claim of the United States.[8] We hold only that the tax claim of the United States is entitled to priority over the tax claim of Texas. The case is remanded to the Court of Civil Appeals for proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[7] Article 7065a, Sections 2(b), 2(d), 8(a), and 8(b).

[8] The texts of the mortgages are not contained in the record; and Dailey did not appear in this Court.